

SERVED: July 14, 1995

NTSB Order No. EA-4377

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 5th day of July, 1995

DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-13220
v.	)	
	)	
WEBSTER B. TODD,	)	
	)	
Respondent.	)	
	)	
	)	

**ORDER DENYING RECONSIDERATION**

Respondent petitions for reconsideration of NTSB Order No. EA-4320, served February 10, 1995. In that decision, we affirmed findings that respondent had violated 14 C.F.R. §§ 91.119(c) and 91.13(a), in low flights over hunters and their truck on or near his ranch on October 25 and 26, 1992.<sup>1</sup> We deny the petition.

Just as he advanced on appeal, respondent again argues that an illegal search must have been conducted by Bureau of Land Management (BLM) Agent Johnstone, who originally investigated the hunters' complaints of low flight and harassment.<sup>2</sup> Specifically,

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<sup>1</sup>We granted respondent's appeal with respect to a third alleged incident.

<sup>2</sup>Mr. Johnstone testified as follows:

he asserts that the law judge erred by refusing to allow testimony to determine whether Mr. Johnstone entered respondent's hangar uninvited in an attempt to ascertain the identification number of respondent's aircraft, and that, in turn, we erred by categorizing the matter as inappropriate for Board review. Further, he argues that without the information Mr. Johnstone gathered on what must have been an illegal search, the Administrator would not have been able to link respondent to the incidents of October 25 and 26.

We remain unconvinced that an inquiry into Mr. Johnstone's actions is either necessary or relevant for the following reasons. Respondent was identified by the eyewitnesses, and the law judge thoroughly evaluated their testimony.<sup>3</sup> The law judge (...continued)

It was brought to my attention from the area manager of the Judith Resource Area, which is within that, the area of the PN Ranch. That they had received a complaint [from] hunters that had encountered low flying aircraft and allegedly were being harassed by the aircraft. And also that public land, the BLM land had been posted as private land by the painting of fluorescent paint.

(Transcript (Tr.) at 218.)

When asked by FAA counsel if the complaints identified Mr. Todd as the alleged violator, Mr. Johnstone replied, "Yes." Id.

<sup>3</sup>While two of the witnesses, in their written statements, identified the aircraft as N5DT, rather than N3DT (the actual number of respondent's aircraft), the aircraft identification number was not critical to proving the allegations of the October 25 and 26 incidents. At least two witnesses identified respondent by name, and described the aircraft as a single engine, high wing aircraft with tricycle landing gear. (Tr. at 30, 81, 137.) In addition, they registered complaints on October 27 at the BLM Visitor's Center that respondent had operated an aircraft at low altitude over them and their vehicle while they were hunting on BLM land. (Tr. at 38-39, 147-48; Mr. Johnstone's Incident Report at 2; see also supra, n. 2.) Mr. Johnstone testified that, on November 4, 1992, he interviewed respondent on the county road near PN Ranch. Respondent told him that "he may have scared some hunters while he was flying looking for cows." (Tr. at 219.)

The hunters identified respondent both by name and as the owner of PN Ranch, and respondent confirmed to the hunters and Mr. Johnstone that he operated his aircraft near the hunters on those dates. The Administrator did not need Mr. Johnstone's assistance in verifying the aircraft identification number, which was not integral to proving the allegations in this case.

noted that Doug Tacia, Reed Tacia, and Stan Grovdahl spoke to respondent on Oct. 23 for permission to hunt on the ranch, since they had been granted that permission in the past. Respondent denied their request, and the witnesses replied that they would hunt on BLM land. (Initial Decision at 346-47.) Regarding the events of October 25, the law judge classified the witnesses' testimony as "consistent and probative and believable." (Initial Decision at 348.) Discussing the incident of October 26, the law judge stated:

Mr. Doug Tacia testified he saw the aircraft and again described it. And I have already gone through the description as obvious that they are all describing the same aircraft. And in my view it is established on the testimony of all the witnesses, including the Respondent, that it is the Respondent's aircraft we are dealing with [on] October 25 and 26. And, in fact, on the testimony of the Respondent, there is no denial that, in fact, he was operating the aircraft on those two days in question. He admits he was doing that. In his testimony he was looking for cattle, but he was flying around and he admits that he saw some people and a truck. So there is no question that he was flying his aircraft on that date.

(Initial Decision at 348-49.)

The law judge relied primarily on the eyewitness testimony, which he found credible, to determine the events of October 25 and 26. At the close of the Administrator's case-in-chief, he denied respondent's motion to dismiss, finding that a prima facie case had been presented. The law judge apparently viewed respondent's testimony as further bolstering his conclusion that respondent carelessly operated an aircraft in low flight over persons and property on October 25 and 26, and it was perfectly permissible for him to utilize that information to reach his decision.<sup>4</sup> He made express credibility determinations and found that a preponderance of the reliable, probative, and substantial

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<sup>4</sup>The hearing is an opportunity for a full and true disclosure of the facts, as they relate to the Administrator's charges. The law judge merely took into account respondent's admission, under oath, that he had operated his aircraft in the vicinity of the hunters on both days, had seen the hunters and their vehicle, and had yelled out the window of his aircraft at one of the hunters, who respondent presumed had heard him. (Tr. at 264-80.) In addition, respondent stated, with regard to his confrontation with the hunters later on October 26, "I came upon the party of hunters that has been previously testified to, and I wouldn't dispute anything that was said previously." (Tr. at 282.)

evidence supports the allegations of the Administrator.<sup>5</sup>

Respondent also argues that the exclusionary rule should apply to the fruits of Mr. Johnstone's alleged illegal search. As we stated supra, n. 3, the aircraft identification number was not necessary for purposes of identifying respondent or proving the Administrator's allegations. In any event, while the exclusionary rule may be applied in certain civil proceedings, the "likely social benefits of excluding unlawfully seized evidence [are weighed] against the likely costs." INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984), citing U.S. v. Janis, 428 U.S. 433, 446 (1976). To perform this evaluation, the officer's primary objective in conducting the search must be determined. Here, Mr. Johnstone's objective, as a BLM employee, was not to perform investigative work for the FAA, but was, rather, to determine whether the incident warranted issuing a violation notice to respondent for interfering with lawful use of BLM land. The main purpose of the exclusionary rule is to deter future unlawful police conduct. Lopez-Mendoza at 3484, citing Janis at 446; U.S. v. Calandra, 414 U.S. 338, 347 (1974). In the instant case, the exclusion from an FAA enforcement proceeding of information gathered by a BLM employee would likely have no effect on future conduct of either BLM or FAA employees.

Respondent also argues that his case was severely prejudiced by the law judge's admission into evidence of respondent's "voluntary statement" and refusal to consider the manner in which it was obtained by the government. He also claims that without this document, the law judge would have had to grant his motion to dismiss. It is undisputed that counsel for the Administrator received, as part of discovery, a copy of the statement from respondent's counsel. Mr. Johnstone testified that he thought he received the document from the local sheriff's office. To the extent that respondent is arguing that his motion to dismiss should have been granted, as we stated supra, n. 5, respondent waived his right to object to the law judge's denial of his motion by going forward with his defense. In addition, any error that may have been committed was harmless, as the eyewitness testimony and the testimony of Mr. Johnstone was consistent with respondent's voluntary statement regarding the hunters' encounters with respondent before and after the low-flight incidents and regarding respondent's explanation that he was just

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<sup>5</sup>Respondent argues that had the law judge granted his motion to dismiss the complaint, respondent "never would have been required to testify at the hearing." (Respondent's brief at 11.) First, respondent waived his right to object to the law judge's denial of his motion to dismiss by going forward with his defense. See Administrator v. Lindsay, NTSB Order No. EA-4095 (1994), aff'd 47 F.3d 1209, 1214 (D.C. Cir. 1995). Second, respondent was not *required* to testify, but *chose* to testify.

looking for cattle.

In sum, we find respondent's arguments unavailing. Our review of the record supports our conclusion, as to the events of October 25 and 26, that the law judge's credibility findings were neither arbitrary nor capricious and that reduction in sanction is not warranted.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The petition is denied; and
2. The 180-day suspension of respondent's airman certificate will begin 30 days from the date of service of this order.<sup>6</sup>

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above order.

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<sup>6</sup>For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA, pursuant to FAR section 61.19(f).